

MAURA HEALEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

(617) 727-2200
www.mass.gov/ago

July 24, 2018

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Robert E. Alger, President/CEO
The Lane Construction Corporation
90 Fieldstone Court
Cheshire, CT 06410
Certified Mail #: 7010 2780 0000 6105 3983

RECEIVED

JUL 30 2018

OFFICE OF THE REGIONAL ADMINISTRATOR

Re: 60-Day Notice of Violations and Intent to File Suit Regarding Unpermitted Discharges of Industrial Material to Housatonic River and Noncompliance with Federal Clean Water Act Industrial Stormwater Discharge Requirements: Lenox Dale Facility, 1 Willow Hill Road, Lee, Massachusetts

Dear Mr. Alger,

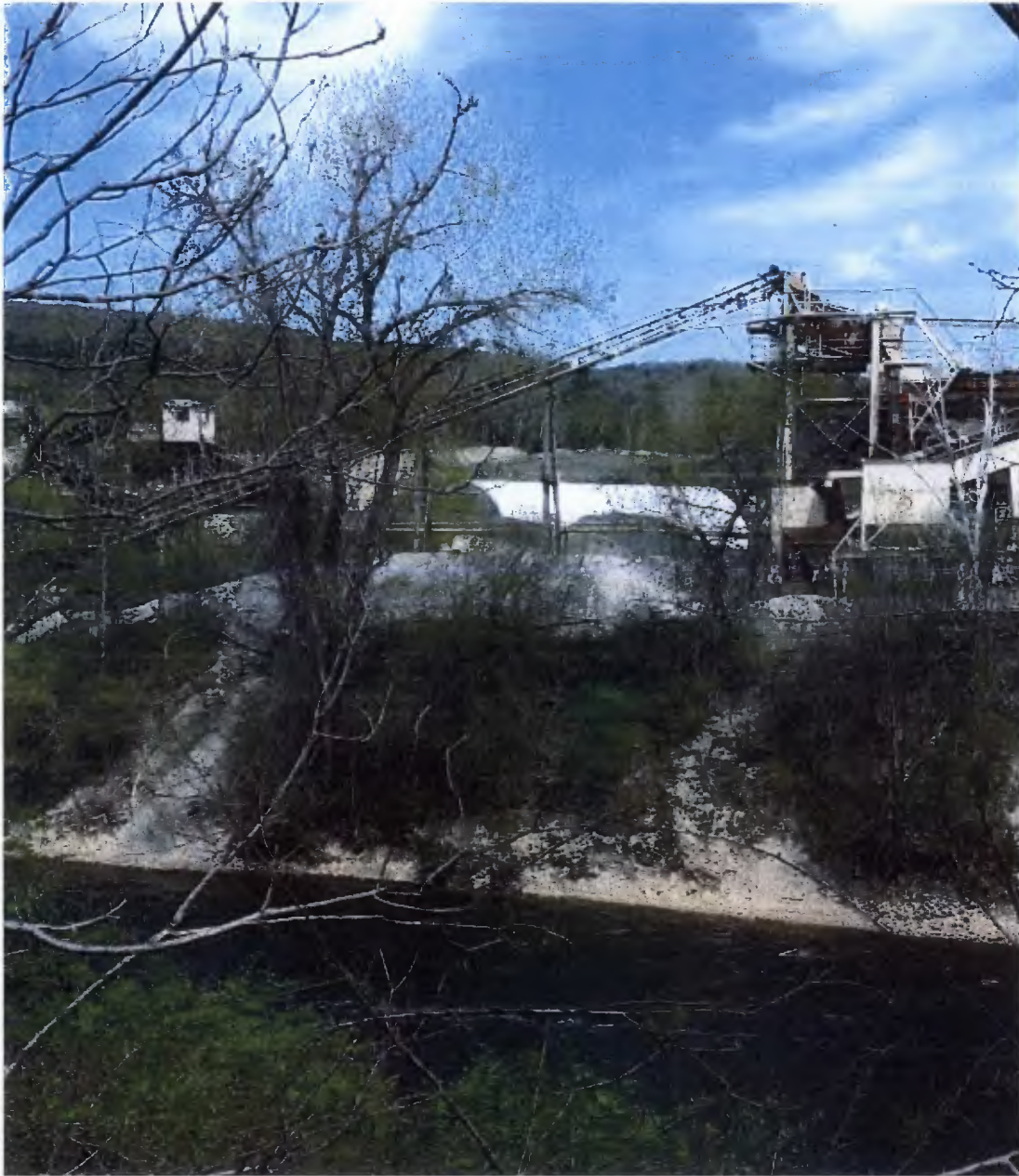
We write to give notice that the Massachusetts Attorney General's Office intends to file a civil action on behalf of the Commonwealth of Massachusetts in the United States District Court for the District of Massachusetts under section 505 of the Federal Clean Water Act (the "Act") against The Lane Construction Corporation ("Lane") for violations occurring at its mineral mining and dressing and asphalt manufacturing facility in Lee, Massachusetts (the "Facility"). The subject of the action will be Lane's unauthorized discharges of industrial material to the Housatonic River and its failure to comply with EPA's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (the "Permit").¹ The complaint will also allege violations of the Massachusetts Wetlands Protection Act and the Massachusetts Clean Waters Act.

The Lane Facility is comprised of hundreds of acres. More than a quarter of a mile of its western edge borders the Housatonic River. Lane uses heavy machinery to move sediment-laden industrial material around the Facility and to place the material in piles, including in piles immediately above the banks of the Housatonic River. As a consequence, industrial material at the Facility falls down onto the river's banks and into the river itself. Pollutants from this material also travel to the river after being mobilized by rain or snow-melt. These discharges are not authorized by any federal or state environmental permit.

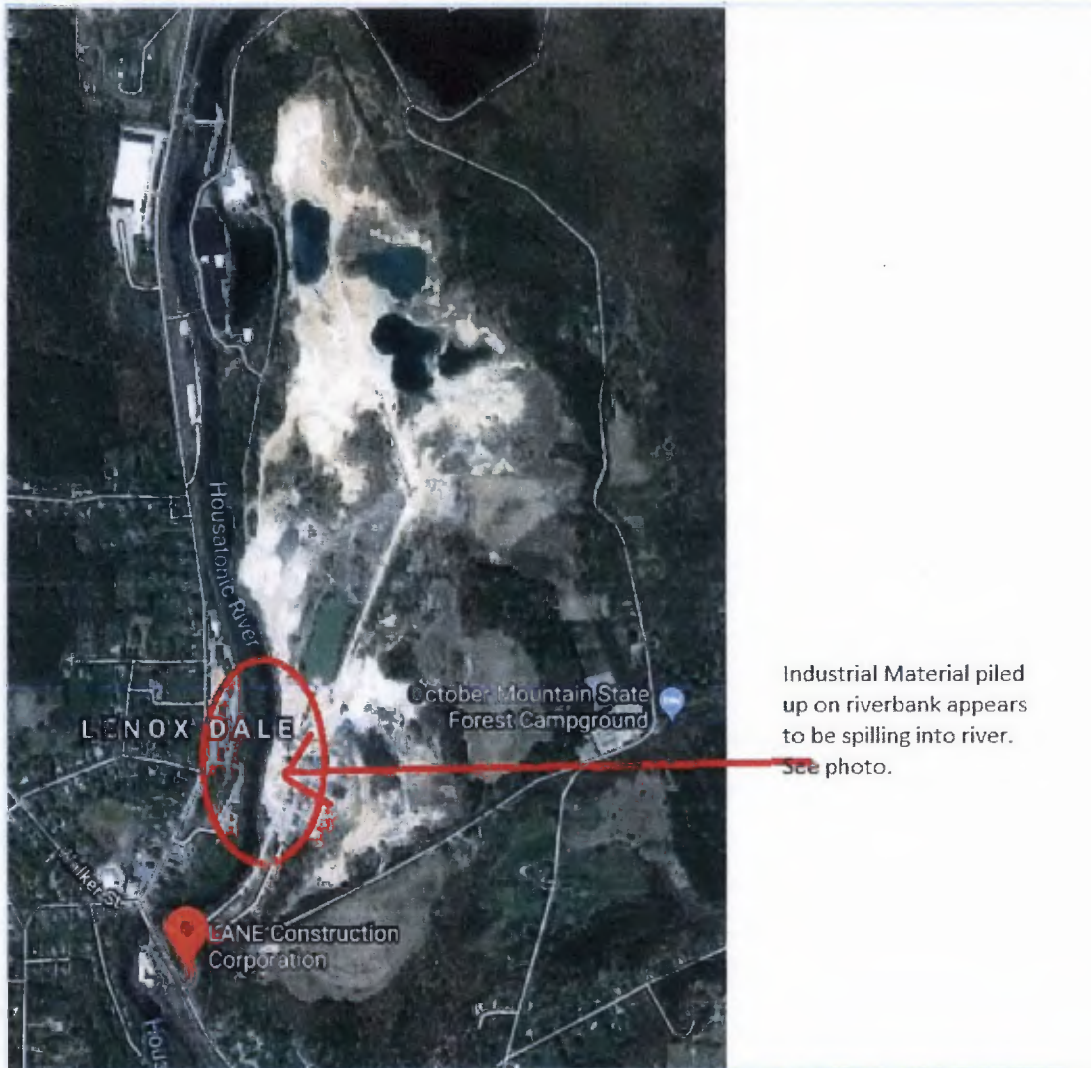
¹ The General Permit was first issued in 1995 and most recently reissued in June 2015 in substantially similar form. See 60 Fed. Reg. 50804 (Sept. 29, 1995); 65 Fed. Reg. 64746 (Oct. 30, 2000); 73 Fed. Reg. 56572 (Sept. 29, 2008), and reissued in 2015 pursuant to 80 Fed. Reg. 34403 (June 4, 2015).



The following photograph, taken on May 14, 2018, provides one example of the manner in which industrial material is being discharged to the Housatonic River and its banks at the Lane Facility:



The following annotated aerial image shows the approximate location of the industrial material pile spillage into the river depicted in the previous photograph:



The presence of excessive sediment loading and the absence of adequate control measures are further confirmed by publicly available aerial imagery, including Google maps and Google Earth. This imagery shows that large areas of the Facility drain towards the Housatonic River, and that there are numerous locations on the Facility's western edge where industrial material has been placed near the river, and is likely being discharged to the river when moved by heavy machinery, when picked up in stormwater, and on a continuing basis through gravity.

BACKGROUND

Sediment consists of loose sand, clay, asphalt, silt or other material that settles at the bottom of a body of water. Excessive sediment transport destroys habitat, harms aquatic organisms and can contribute to flooding. The Housatonic River is a state-listed impaired waterbody and is habitat for several species that are endangered or of special concern. These include mollusks such as the Creeper, the Triangle Floater, and the Boreal Marstonia and fish such as the Bridle Shiner and the Longnose Sucker. The survival of these aquatic organisms is threatened by excessive sedimentation. Sediment settles to the bottom of a river where it disrupts and smothers bottom feeding organisms such as mollusks. Sediment becomes suspended in water, where it harms and kills fish by clogging their gills, making it harder for them to breath. Excessive sedimentation harms the entire food chain by destroying habitat and killing the smaller organisms on which larger ones depend. For example, sediment in the water column increases turbidity, reducing light penetration, decreasing the ability of plant communities to photosynthesize. In addition, certain chemical pollutants, including toxic pollutants such as heavy metals, pesticides and petroleum by-products, bind to sediment and are picked up by stormwater as it washes across the land during rain and snow-melt events. Stormwater contaminated with these pollutants can significantly impact water quality when it is discharged to rivers and other waterbodies.

Lane's Facility is immediately adjacent to the Housatonic River. The company's operations are sediment intensive and take place mostly outside. Lane discharges sediment and other pollutants to the Housatonic River during the course of its extraction and manufacturing processes, particularly when it moves the material around the Facility with heavy equipment and stockpiles it at various locations, including in areas immediately above the banks of the river. Pollutants also travel to the river via rainwater and snow melt from these locations.

The following are *some* of the activities, pollutant sources, and pollutants that may be present with Lane' mineral mining and dressing processes:

Activity	Pollutant Source	Pollutant
Site Preparation	Road construction	Dust, total suspended solids (TSS), total dissolved solids (TDS), turbidity
	Removal of overburden	
	Removal of waste rock to expose the mineral body	
Mineral Extraction	Blasting activities	Dust, TSS
Mineral Processing Activities	Rock sorting	Dust, TSS, TDS, turbidity, fines
	Rock crushing	Dust, TSS, TDS, turbidity, fines
	Rock washing	TSS, TDS, turbidity, pH
	Raw material storage	Dust, TSS, TDS, turbidity
	Waste rock storage	Dust, TSS, TDS, turbidity, pH
	Raw material loading	Dust, TSS, TDS, turbidity
	Processing materials unloading	Diesel/gas fuel, oil, lime
	Raw or waste material transportation	Dust, TSS, TDS, turbidity

Other Activities	Sedimentation pond upsets	TSS, TDS, turbidity, pH
	Sedimentation pond sludge removal and disposal	Dust, TSS, TDS, turbidity, pH
	Air emission control cleaning	Dust, TSS, TDS, turbidity
Equipment/Vehicle Maintenance	Fueling activities	Diesel/gas fuel, oil
	Parts cleaning	Solvents, oil, heavy metals, acid/alkaline wastes
	Waste disposal of oily rags, oil and gas filters, batteries, coolants, degreasers	Oil, heavy metals, solvents, acids
	Fluid replacement including hydraulic fluid, oil, transmission fluid, radiator fluids, and grease	Oil, arsenic, lead, cadmium, chromium, benzene, TCA, TCE, PAHs, solvents
Reclamation Activities	Site preparation for stabilization	Dust, TSS, TDS, turbidity
	Fertilizers	Nitrogen, phosphorus

Source: EPA Industrial Stormwater Fact Sheet Series, Sector J: Mineral Mining and Processing Facilities December 2006)(available at https://www3.epa.gov/npdes/pubs/sector_j_mineralmining.pdf).

The following are *some* of the activities, pollutant sources, and pollutants that may be present with Lane' asphalt manufacturing processes:

Activity	Pollutant Source	Pollutant
<i>Asphalt Paving and Roofing Materials</i>		
Outdoor stockpiling of materials	Exposure of aggregate (sand, stone, limestone, gravel, etc.) to precipitation	Total suspended solids (TSS), total dissolved solids (TDS) biochemical oxygen demand (BOD5), chemical oxygen demand (COD), oil and grease (O&G), benzene, methylene blue active substances (MBAS), metals, pH
Storage of materials in above-ground tanks	Leakage from tanks	TSS, TDS, BOD5, COD, O&G, benzene, MBAS, metals, pH
Transport of materials by a conveyor or front-end loader	Exposed materials and potential spills	TSS, TDS, BOD5, COD, O&G, benzene, MBAS, metals, pH

Source: EPA Industrial Stormwater Fact Sheet Series, Sector D: Asphalt Paving and Roofing Materials Manufacturers and Lubricant Manufacturers December 2006)(available at https://www.epa.gov/sites/production/files/2016-03/documents/sector_d_asphalt_0.pdf).

The Attorney General's Office will ask the Court to ensure Lane's future compliance with the Act, assess civil penalties in an appropriate amount,² award the Commonwealth its litigation costs, including attorney and expert fees, and award any other relief the Court deems appropriate. The Commonwealth's complaint will be filed a minimum of 60 days after the postmark date of this letter. This is a formal 60-day notice of intent to sue that is being served pursuant to 40 C.F.R., Part 135.

This notice is being provided by the Commonwealth of Massachusetts, acting by and through the Office of Attorney General Maura Healey.

² The Statute authorizes the Court to assess a penalty of up to \$52,414 a day for each violation. *See* 33 U.S.C. § 1319(d) and 82 Fed. Reg. 3633 (Jan. 12, 2017).

Counsel for the Commonwealth of Massachusetts in this case is:

Nora J. Chorover, Special Assistant Attorney General
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617-963-2642 (direct)
Nora.Chorover@state.ma.us

LANE'S VIOLATIONS AND DATES OF VIOLATIONS

A. THE REQUIREMENTS OF THE ACT

1. Pollutant Discharges without a Permit Are Illegal.

The Clean Water Act makes the discharge of pollution into waters of the United States unlawful unless the discharge is in compliance with certain statutory requirements, including the requirement that the discharge be permitted by the federal Environmental Protection Agency ("EPA") under the National Discharge Elimination System ("NPDES"). See sections 301(a), 402(a) and 402(p) of the Act. 33 U.S.C. §§ 1311(a), 1342(a), 1342(p).

2. Mineral Mining and Dressing and Asphalt Manufacturing Facilities Must Comply with EPA's General Industrial Stormwater Permit.

In order to minimize polluted stormwater discharges from certain categories of industrial facilities, EPA issued the Permit. Mineral mining and dressing facilities and asphalt manufacturing facilities are subject to the requirements of this Permit.³ Mineral mining and dressing and asphalt manufacturing which carry on other types of activities also subject to the requirements of the Permit must also comply with any sector-specific requirements for such co-located industrial activity.⁴

The Permit requires facilities such as Lane's to, among other things:

- a. prepare a stormwater pollution plan ("SWPPP") that, among other things, describes the facility and identifies all stormwater outfalls;⁵
- b. submit to EPA a "Notice of Intent" to be covered by the Permit that lists all stormwater outfalls by a unique 3 digit code and corresponding latitude and longitude coordinates;⁶
- c. ensure that pollutant control measures minimize pollutants in stormwater discharges;⁷

³ Permit, Appendix D, pgs. D-2 and D-3.

⁴ Permit, pgs. 61, 101.

⁵ Permit, pg. 31.

⁶ Permit, Appendix G.

⁷ Permit, pg. 14.

- d. locate materials, equipment, and activities to contain potential spills;⁸
- e. minimize erosion by stabilizing exposed soils at the facility and use structural and non-structural control measures to minimize the discharge of sediment;⁹
- f. evaluate for and eliminate unauthorized non-stormwater discharges;¹⁰
- g. ensure that stormwater discharges do not cause or have the reasonable potential to cause or contribute to a violation of water quality standards;¹¹
- h. implement specific best management practices applicable to mineral mining and dressing facilities;¹²
- i. monitor stormwater discharges from all outfalls for compliance with benchmarks applicable to mineral mining and dressing facilities and asphalt manufacturing facilities;¹³
- j. report all monitoring results for all facility outfalls to EPA by specified deadlines;¹⁴
- k. conduct corrective action to expeditiously eliminate excessive stormwater pollution and unauthorized non-stormwater discharges;¹⁵
- l. conduct routine facility inspections at least quarterly¹⁶ and quarterly visual assessments¹⁷ to, among other things, sample and assess the quality of the facility's stormwater discharges, ensure that stormwater control measures required by the permit are functioning correctly and are adequate to minimize pollutant discharge, and timely perform corrective actions when they are not;¹⁸
- m. timely prepare and submit to EPA annual reports that include findings from the facility inspections and visual assessments and the documentation of corrective actions;¹⁹ and
- n. comply with any additional Massachusetts requirements, including but not limited the requirements of the Massachusetts Clean Waters Act and the Massachusetts Wetlands Protection Act and their implementing regulations.²⁰

⁸ Permit, pg. 15.

⁹ Permit, pg. 17.

¹⁰ Permit, pg. 19.

¹¹ Permit, pg. 20.

¹² Permit, pgs. 101-113.

¹³ Permit, pgs. 39, 61 and 113.

¹⁴ Permit, pgs. 48-49.

¹⁵ Permit, pgs. 27-29.

¹⁶ Permit, pg. 22.

¹⁷ Permit, pg. 24.

¹⁸ Permit, pgs. 22-26.

¹⁹ Permit, pgs. 49-50.

²⁰ Permit, pg. 170.

B. LANE'S VIOLATIONS AND DATES OF VIOLATIONS

1. Discharges of Industrial Material to the Housatonic River Without a Permit, in Violation of the Federal Clean Water Act

Lane has discharged and continues to discharge industrial material into the Housatonic River from one or more point sources, including but not limited to the heavy equipment Lane uses to move and store industrial material on the western edge of the Facility. By discharging industrial material to the Housatonic River without a NPDES permit, Lane has violated and continues to violate the federal Clean Water Act prohibition on unpermitted discharges.²¹

As illustrated by the photograph on page 2, industrial material can be found on the banks of the Housatonic River beneath the western edge of the Facility leading down to and below the surface of the river. Because of the angle at which this material has been placed by Lane, it is more likely than not that sediment continues to discharge down the banks and into the river from the Facility every day. Accordingly, the Commonwealth will allege that violations of the Act's prohibition against unpermitted discharge of industrial material have occurred on a daily basis for the last five years and that they are continuing to occur.

2. Violations of the Federal Industrial Stormwater Permit

Lane has violated numerous provisions of the Permit, as listed below. These violations have occurred on a daily basis for the last five years and they are continuing to occur.²² Lane failed to to:

- a. include the location of *all* stormwater outfalls in the SWPPP (violation of section 5.2.2);
- b. submit a "complete and accurate NOI" that includes the location of *all* stormwater outfalls (violation of section 1.2.1 and Appendix G);
- c. ensure that pollutant control measures minimize pollutants in its stormwater discharges (violation of section 2.1);
- d. evaluate for the presence of and eliminate all non-stormwater discharges at the Facility (violation of section 2.1.2.9);
- e. ensure that stormwater discharges do not cause or contribute to a violation of water quality standards (violation of section 2.2.1);
- f. monitor stormwater discharges from all outfalls for compliance with EPA's benchmark limits (violation of section 6.1.1);
- g. report to EPA monitoring results for all outfalls (violation of Section 7.4);
- h. take corrective action to eliminate non-stormwater discharges and address excessive sedimentation; (violation of section 4.1);

²¹ See Sections 301(a), 402(a) and 402(p) of the Act. 33 U.S.C. §§ 1311(a), 1342(a), 1342(p).

²² The Attorney General believes that the violations set forth in Section B(2) have occurred on each day of the last five years, and not just on rain days. However, to the extent it is determined that rain days are relevant in determining the dates of violations, such rain dates through July 6, 2018 are set forth on Exhibit A hereto. The complaint, when filed, will set forth additional rain dates since July 6, 2018.

i. conduct routine and quarterly facility inspections to ensure, among other things, that control measures are functioning correctly and are adequate to minimize pollutant discharges (violation of sections 3.1 and 3.2); and

j. comply with additional state requirements incorporated by reference into the Permit, including the Massachusetts Clean Waters Act and the Massachusetts Wetlands Protection Act (violation of section 9.1.2.1).

3. Pendent State Claims: Violations of the Massachusetts Wetlands Protection Act, and the Wetlands Regulations (G.L.c. 131, § 40; 310 C.M.R. § 10.00) and Violations of the Massachusetts Clean Waters Act and its Implementing Regulations (G.L. ch. 21, § 43(2); 314 C.M.R. § 3.00)


The Commonwealth's complaint, when filed, will allege that Lane violated the Massachusetts Wetlands Protection Act by altering or filling banks of the Housatonic River and land under the Housatonic River without an Order of Conditions from the Lee Conservation Commission or Superseding Order of Conditions from the Massachusetts Department of Environmental Protection, as required by G.L. c. 131, § 40 and 310 C.M.R. §§ 10.02(2)(a) and 10.05(4)(a), and by allowing the unauthorized fill to remain in place on the river bank and ground underneath the river in violation of G.L. c. 131, § 40 and 310 C.M.R. § 10.02(a). The complaint will further allege that Lane violated the Massachusetts Clean Waters Act by storing industrial materials immediately above the banks of the Housatonic River in piles from which material is capable of spilling off towards the river, in violation of G.L. c. 21, § 43(2) and 314 C.M.R. § 3.04(1) (prohibiting activities that may reasonably result, directly or indirectly, in the discharge of pollutants to waters of the Commonwealth without a permit), and by discharging industrial materials into the Housatonic River, in violation of G.L. c. 21, § 43(2) and 314 C.M.R. § 3.03(1).

CONCLUSION

The Attorney General's Office believes this Notice of Violations and Intent to File Suit sufficiently states the basis for a civil action. During the 60-day notice period, we would be willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of litigation. If you wish to pursue such discussions, please have your attorney contact us within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL

By: 

Nora J. Chorover
Special Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2642

cc: (by certified mail)

Alexandra Dapolito Dunn
EPA New England, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109
Certified Mail # 7010 2780 0000 6105 3990

Andrew Wheeler, Acting Administrator
US EPA Headquarters, Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington DC 20460
Certified Mail # 7010 2780 0000 6105 2443

Plant Manager
The Lane Construction Corporation
1 Willow Hill Road
Lee, MA 01238
Certified Mail # 7010 2780 0000 6105 2474

Martin Suuberg, Commissioner
Massachusetts Dept of Environmental Protection
One Winter Street
Boston, MA 02108
Certified Mail # 7010 2780 0000 6105 4003

CT Corporation System
Registered Agent for
The Lane Construction Corporation
155 Federal Street, Suite 700
Boston, MA 02110
Certified Mail # 7010 2780 0000 6105 2450

EXHIBIT A

DAYS BETWEEN JANUARY 1, 2013 AND JULY 6, 2018 ON WHICH STORMWATER FROM FACILITY DISCHARGED TO WATERS OF THE UNITED STATES

January 2013:	11, 28, 29, 30, 31
February 2013:	8, 9, 19, 24, 27
March 2013:	12, 18, 19, 31
April 2013:	1, 10, 11, 12, 16, 19, 20, 25
May 2013:	8, 9, 11, 19, 22, 23, 24, 25, 26, 29
June 2013:	2, 6, 7, 8, 10, 11, 13, 14, 17, 18, 27, 28, 30
July 2013:	7, 9, 22, 23, 28
August 2013:	1, 2, 9, 13, 22, 26, 27, 31
September 2013:	1, 2, 10, 11, 12, 21, 22
October 2013:	4, 6, 7, 30, 31
November 2013:	1, 7, 18, 22, 26, 27
December 2013:	5, 6, 14, 15, 17, 21, 23, 29
January 2014:	2, 6, 11, 14
February 2014:	3, 5, 13, 14, 15, 16, 19, 20, 21
March 2014:	12, 19, 28, 29, 30
April 2014:	4, 8, 11, 15, 26, 29, 30
May 2014:	1, 4, 22, 27
June 2014:	11, 13, 18, 25
July 2014:	2, 3, 4, 7, 8, 13, 14, 15, 16, 23, 27, 28
August 2014:	5, 13, 21
September 2014:	2, 13, 16
October 2014:	1, 4, 8, 15, 16, 21, 22, 23, 24, 29
November 2014:	6, 7, 17, 24, 26
December 2014:	5, 6, 9, 10, 16, 17, 23, 24, 25, 28
January 2015:	3, 4, 12, 18, 24, 27
February 2015:	2, 5, 8, 14, 19, 20, 23
March 2015:	1, 3, 14, 25, 26
April 2015:	4, 8, 10, 20, 21, 22
May 2015:	19, 27, 28, 31
June 2015:	1, 2, 6, 8, 9, 12, 15, 21, 27, 28, 29
July 2015:	1, 4, 7, 9, 13, 18, 19, 26
August 2015:	1, 4, 11, 15, 21, 25
September 2015:	9, 10, 12, 13, 29, 30
October 2015:	9, 13, 16, 25, 28, 29
November 2015:	10, 11, 12, 19, 28
December 2015:	1, 2, 14, 15, 17, 22, 23, 27, 29
January 2016:	10, 16
February 2016:	3, 8, 15, 16, 20, 24, 25, 29
March 2016:	2, 10, 11, 14, 16, 25, 28

April 2016:	2, 3, 4, 7, 11, 12, 26
May 2016:	1, 2, 3, 4, 6, 13, 14, 24, 30
June 2016:	5, 7, 11, 28
July 2016:	1, 5, 8, 9, 10, 15, 29, 31
August 2016:	1, 2, 10, 12, 13, 16, 21
September 2016:	11, 18, 19, 27
October 2016:	13, 21, 22, 27
November 2016:	15, 16, 20, 24, 29, 30
December 2016:	1, 12, 17, 18, 24, 29
January 2017:	3, 4, 11, 12, 17, 23, 24, 26
February 2017:	7, 8, 9, 10, 12, 24, 25
March 2017:	7, 8, 14, 25, 27, 28, 31
April 2017:	4, 6, 7, 12, 16, 19, 20, 21, 25, 26
May 2017:	1, 2, 5, 6, 7, 13, 14, 15, 18, 22, 25, 26, 29, 31
June 2017:	5, 6, 16, 19, 24, 26, 27, 30
July 2017:	1, 7, 8, 12, 17, 24, 25, 27
August 2017:	2, 8, 9, 12, 15, 18, 22
September 2017:	3, 5, 6, 7, 30
October 2017:	8, 9, 15, 24, 29, 30
November 2017:	6, 16, 18, 19, 30
December 2017:	5, 6, 9, 23, 25
January 2018:	4, 12, 13, 16, 17, 23, 28
February 2018:	4, 7, 11, 16, 17, 19, 22, 23, 25
March 2018:	2, 7, 8, 13, 14, 29
April 2018:	2, 3, 6, 12, 15, 16, 25, 27, 28, 29
May 2018:	4, 6, 12, 15, 19, 22
June 2018:	1, 4, 18, 19, 24, 25, 27, 28
July 2018:	6